**Before the**
**FEDERAL COMMUNICATIONS COMMISSION**
**Washington, D.C. 20554**





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| In the Matter of | ) | |
| | ) | GN Docket No. 93-252 |
| Implementation of Sections 3(n) and 332 of the Communications Act | ) | |
| | ) | |
| Regulatory Treatment of Mobile Services | ) | |

**COMMENTS OF**
**THE CELLULAR TELECOMMUNICATIONS INDUSTRY ASSOCIATION**

The Cellular Telecommunications Industry Association ("CTIA")[1] respectfully submits its comments to the Second Further Notice of Proposed Rule Making in the above-captioned proceeding.[2]

**Introduction**

On June 20, 1994, CTIA filed comments in response to a prior Further Notice of Proposed Rule Making in this docket concerning a proposed CMRS spectrum cap.[3] In its comments, CTIA opposed the

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[1] CTIA is a trade association whose members provide commercial mobile services, including over 95 percent of the licensees providing cellular service to the United States, Canada, and Mexico, and the nation's largest providers of ESMR service. CTIA's membership also includes wireless equipment manufacturers, support service providers, and others with an interest in the wireless industry. CTIA and its members have a direct and vital interest in the outcome of this proceeding.

[2] *In the Matter of Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services*, GN Docket No. 93-252, FCC 94-191 (released July 20, 1994) ("*Second Further Notice*").

[3] *In the Matter of Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services*, GN

FCC's proposal to impose a limit on the amount of spectrum that CMRS licensees may acquire in a geographic market. Specifically, CTIA stated that there is no benefit in limiting opportunities for CMRS providers to obtain additional spectrum given the large amount of spectrum now available for CMRS use, and the competitive market structure established by the Commission for both narrowband and broadband PCS services. On the other hand, a spectrum cap could impose a real burden to the available spectrum being utilized according to its highest economic use.[4]

On July 20, 1994, the Commission adopted a Second Further Notice of Proposed Rule Making in this proceeding. In the *Second Further Notice*, the Commission requests additional comment on whether non-equity relationships such as management agreements, resale agreements, and joint marketing agreements should be treated as attributable interests under the Commission's rules governing the PCS spectrum aggregation cap, the PCS-cellular cross-ownership restrictions, and any CMRS spectrum aggregation cap the Commission may establish.[5] Specifically, the Commission asks: 1) whether the FCC should apply any such attribution rules differently to the designated entities; 2) whether there are relationships, not

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Docket No. 93-252, Further Notice of Proposed Rule Making , FCC 94-100 (released May 20, 1994) ("*Spectrum Cap Notice*").

[4] CTIA Comments at 8-9.

[5] *Second Further Notice* at para. 4.

included in the PCS attribution rules, that do not rise to the level of control, but should be considered attributable because such interest may affect the incentive or ability of PCS and other CMRS licensees to compete vigorously in the marketplace; and 3) whether management agreements or similar arrangements that do not confer *de facto* control on a party other than the licensee should be considered attributable interests.

CTIA strongly urges the Commission not to treat management agreements, resale agreements, joint marketing agreements, and other similar non-equity relationships as attributable interests for purposes of applying the PCS spectrum aggregation cap, the PCS-cellular cross-ownership restrictions, or any CMRS spectrum aggregation cap that the Commission may establish. The inclusion of such agreements in the ownership attribution analysis would delay the licensing of broadband PCS services, and thereby hamper the rapid deployment of PCS to consumers.

Expanding attributable interests to reach non-equity relationships that do not fall within the *de facto* and *de jure* tests already established by Commission rules would frustrate PCS licensees' ability to attract needed expertise and capital and would create additional and unnecessary regulatory burdens for the Commission and broadband PCS bidders. Such additional restrictions are unnecessary since the Commission already has provided more than sufficient restrictions and conditions to ensure that no CMRS

provider will exert market power by controlling large amounts of spectrum in a given geographic market, and to ensure that designated entities will truly be the real party in interest, and not fronts or shams.

**Delay of Broadband PCS to Consumers**

In the *Fifth Report and Order*, the Commission adopted rules and procedures governing the auction process.[6] Under the pre-auction application procedures, applicants for the entrepreneurs' blocks are required to certify their eligibility to bid on and win licenses in those blocks. Such certification means they comply with the FCC's PCS-cellular and PCS-PCS cross ownership restrictions. Including non-equity relationships within the scope of the already restrictive ownership attribution rules will simply increase the complexity and prolong the qualification process to bid for broadband PCS licenses.

Once the applicants had reviewed and carefully structured every equity and non-equity relationship to ensure compliance prior to the auction, the FCC still would face the enormous task of scrutinizing every non-equity agreement for each winning bidder during the post-auction review process. Such review inevitably

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[6] *In the Matter of Implementation of Section 309(j) of the Communications Act - Competitive Bidding*, PP Docket No. 93-253, Fifth Report and Order, FCC 94-178 (released July 15, 1994), 59 Fed. Reg. 37566 ("*Fifth Report and Order*").

would prolong the post-auction review process and ultimately would result in delaying the award of broadband PCS licenses.[7]

As described below, the Commission's existing restrictions are more than sufficient to ensure a competitive market structure and provide meaningful safeguards against the creation of fronts or shams. To invite delay under therse circumstances is contrary to the Commission's stated goals to provide rules that are structured to ensure that qualified bidders and licensees will be able to construct systems quickly and to prevent delays in the provision of broadband PCS to the public.[8]

**More Than Sufficient Restrictions Already Ensure Competition**

It appears that the Commission's rationale for imposing PCS spectrum caps, PCS-cellular cross-ownership restrictions, a CMRS spectrum cap, and now the inclusion of non-equity relationships into its attribution rules is "to ensure that no CMRS provider will exert market power by controlling large amounts of spectrum in a given market."[9]

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[7] While the Commission has adopted expedited procedures to resolve "substantial and material issues of fact concerning qualifications," there is no indication that the Commission has allocated resources to enable the Commission to complete a post-auction review of the numerous non-equity agreements in a time period that is consistent with the Commission's goal of early and rapid deployment of broadband PCS to consumers. *See Fifth Report and Order*, paras. 84-85.

[8] *Fifth Report and Order*, para. 58.

[9] *Second Further Notice*, para. 1.

While CTIA has provided an extensive record which demonstrates the competitive nature of the CMRS marketplace even without restrictive overlap and attribution rules, cross-ownership restrictions, and spectrum caps,[10] the Commission has adopted all of these and even other, more restrictive, rules for broadband PCS.

For example, the Commission acknowledges in the *Second Further Notice* that non-equity agreements that confer *de facto* control will be treated in accordance with the FCC's existing precedent on such issues.[11] The Commission also recently adopted a PCS multiplier rule which is designed to measure the level of influence that an intervening corporate entity may have indirectly in cellular and broadband PCS licensees.[12] Other examples include the ownership

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[10] *CTIA Request for Declaratory Ruling and Petition for Rule Making*, RM 8179 (January 29, 1993); CTIA Comments and Reply Comments, *In the Matter of Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services*, GN Docket No. 93-252 (November 1993); CTIA Reply Comments at pp. 5-6, *In the Matter of Further Forbearance from Title II Regulation for Certain Types of Commercial Mobile Radio Service Providers*, GN Docket No. 94-33 (July 11, 1994). *See also*, Besen *et al.*, Charles River Associates, "An Economic Analysis of Entry By Cellular Operators Into Personal Communications Services, " submitted as an Appendix to CTIA Comments, *In the Matter of Amendment of the Commission's Rules to Establish New Personal Communications Services*, Gen. Docket No. 90-314 (November 1992).

[11] *Second Further Notice*, note 7.

[12] *In the Matter of Amendment of the Commission's Rules to Establish New Personal Communications Services in the 2 GHz Band*, Gen. Docket No. 90-314, Further Order on Reconsideration, FCC 94-195 (released July 22, 1994).

attribution standards for small, women-, and minority-owned businesses, particularly the identification of a "control group;" the 10 percent cap on the number of licenses within the entrepreneurs block that a single entity might win at auction, in order to "avoid undue concentration"; and the in-market eligibility restrictions on cellular incumbents, particularly the 10 percent population overlap restriction.

These existing rules are more than sufficient to ensure that the public will receive the full benefits of a competitive market; including non-equity relationships into the broadband PCS attribution rules would only risk delaying the introduction of PCS service during the pendancy of lengthy regulatory challenges initiated by the very parties who benefit from such a delay, and also would risk denying PCS licensees access to the expertise and capital they need to construct and successfully operate their systems.

**Management Agreements**

The Commission specifically seeks comment regarding the issue of whether management agreements, which concededly do not amount to *de facto* control, may reduce competitive choices in the marketplace or create a sham or front corporation to take advantage of designated entity provisions.[13] At the outset, it is unclear to

[13] *Second Further Notice,* at para. 6.

CTIA why the Commission would seek to restrict the access of broadband PCS licensees to the very firms who possess the greatest experience in providing wireless communications services. This is especially true with respect to designated entities who heretofore have not participated in the wireless industry, and who stand to gain the most from entering into management agreements with experienced service providers.

The Commission's existing precedent already considers any agreement that confers *de facto* control on a party to be an attributable interest.[14] This is more than sufficient to satisfy the Commission's legitimate public interest needs. As the FCC knows from experience, determinations of *de facto* control pursuant to *Intermountain* and its progeny consume considerable Commission resources, and can take years to resolve. In addition to causing substantial delay, imposing a less well defined alternative standard for broadband PCS licensees will introduce uncertainty, and inject the FCC into corporate contractual relationships to a heretofore unprecedented extent.

Finally, the Commission seems concerned about the inchoate risk of a lessening of competition arising from management agreements between a PCS licensee and a real or potential competitor. Since the Commission previously has determined that it

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[14] *See generally,* Intermountain Microwave, 24 RR 983 (1963)(*Intermountain*), and *Second Further Notice* at n.7.

will not permit either *de jure* or *de facto* control of these licensees, a PCS licensee would have no reason to enter into any agreement that was not in its best interest, such as any agreement that caused it to restrain its competitive zeal.[15] Thus, there is no basis to restrict PCS licensees from entering into management agreements.

**Joint Marketing Agreements**

The Commission also seeks comment on whether joint marketing agreements should constitute an attributable interest in the context of a PCS spectrum aggregation cap, PCS-cellular cross-ownership restrictions, or a general CMRS spectrum cap.[16] CTIA believes that the benefits to the public of such agreements far outweigh any risks.

As the Commission recognizes, joint marketing agreements may be beneficial to both licensees and consumers because of the savings that could be realized by pooling resources for advertising and direct sales. In addition to these savings, marketing agreements can facilitate competition and customer acceptance of new PCS services by encouraging licensees to provide common features and services as a way of differentiating their service offerings from their competitors. Existing antitrust enforcement

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[15] The antitrust laws would reach any concerted agreements in restraint of trade.

[16] *Second Further Notice* at para. 14.

authority, which permits the government or any aggrieved person to commence an action, and the Commission's own authority over licensees' conduct is sufficient to allay any residual concerns that a specific agreement might have an anticompetitive effect.

**Conclusion**

For the foregoing reasons, CTIA strongly urges the Commission to reject proposals to include non-equity relationships such as management agreements, joint marketing agreements, resale agreements and other similar agreements in determining attributable interests in applying the PCS spectrum aggregation cap, PCS-cellular cross-ownership restrictions, or any CMRS spectrum cap the Commission may establish.

Respectfully submitted,

**Cellular Telecommunications Industry Association**

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August 9, 1994